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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 304. 43

E. S. COE, PLAINTIFF IN ERROR,

vs.

THE TOWN OF ERROL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE.

FILED OCTOBER 5, 1882.

SUPREME COURT OF THE UNITED STATES.

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No. 304.

E. S. COE, PLAINTIFF IN ERROR,

vs.

THE TOWN OF ERROL.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the supreme court of the State of New Hampshire:

Because in the record and proceedings, and also in the rendition of the judgment of a petition which is in said supreme court of the State of New Hampshire, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit, between E. S. Coe and The Town of Errol, wherein was drawn in question the construction of a clause of the Constitution of the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the Constitution, a manifest error hath happened, to the great damage of the said E. S. Coe, as by his complaint appears: We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court of the United States

2 then and there to be held, that the record of proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the said Supreme Court of *of* the United States, the 7th day of September, in the year of our Lord one thousand eight hundred and eighty-two.

[SEAL.] WILLIAM H. HACKETT,
Clerk of the Circuit Court of the United States for the District of New Hampshire.

3 Supreme court of the State of New Hampshire, clerk's office of said court, at Lancaster, in the county of Coos, this 6th day of September, 1882.

I hereby certify that a true copy of this writ of error is filed in said clerk's office, at this date.

Witness my hand and the seal of said court, this 6th day of September, 1882.

Attest: [SEAL.] M. A. HASTINGS, *Clerk.*

[Endorsed:] Writ of error. E. S. Coe *vs.* The Town of Errol. Filed Sept. 6, 1882. M. A. Hastings, clerk.

4 UNITED STATES OF AMERICA, *ss:*

To the Town of Errol, in the county of Coos and State of New Hampshire, Greeting:

You are hereby cited and admonished to be and appear at a

Supreme Court of the United States, to be holden at Washington on the second Monday of October, A. D. 1882, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of New Hampshire, at Lancaster, in the county of Coos, wherein E. S. Coe, of Bangor, in the county of Penobscott and State of Maine, is plaintiff, and said Town of Errol is defendant in error, to show cause, if any there be, why the judgment in said writ of error complained of should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 7th day of September, A. D. 1882.

C. DOE,
Chief Justice of the Sup. C't of New Hamp.

5 [Endorsed:] Writ of error. E. S. Coe *vs.* The Town of Errol. The citation. We hereby accept service of the within process, and agree that this acceptance of service shall be as effectual as legal service. Lancaster, N. H., Sept. 7, 1882. The Town of Errol, by Ladd & Fletcher, its att'ys. Filed Sept. 6, 1882. M. A. Hastings, clerk.

6 (Copy.)

Know all men by these presents, that we, E. S. Coe, of Bangor, in the county of Penobscott and State of Maine, as principal, and Henry Heywood and William Heywood, both of Lancaster, in the county of Coos and State of New Hampshire, as sureties, are held and firmly bound unto The Town of Errol, in said county of Coos, in the sum of one thousand dollars, to be paid to the said Town of Errol; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated the 7th day of September, A. D. 1882.

Whereas the said E. S. Coe hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the petition of said E. S. Coe against said Town of
7 Errol by the supreme court of the State of New Hampshire, at the term of said court held at Colebrook, in the county of Coss in said State, on the first Tuesday of September, 1882: Now, therefore, the condition of this obligation is such, that if the said E. S. Coe shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise, the same to be and remain in full force and virtue.

E. S. COE, [L. S.]
By W. & H. HEYWOOD, *His Att'y.*
HENRY HEYWOOD. [L. S.]
WM. HEYWOOD. [L. S.]

I hereby acknowledge that W. & H. Heywood were duly authorized to execute for me the foregoing bond and ratify the same.

Sept. 15, 1882. E. S. COE.

Coos, *ss:*

The foregoing is a true copy of the original on file in my office.
Attest: [SEAL.] M. A. HASTINGS, *Clerk.*

8 [Endorsed:] Copy of bond. E. S. Coe *v.* Town of Errol. Filed and accepted Sept. 7, 1882. M. A. Hastings, clerk.

9 STATE OF NEW HAMPSHIRE, *Coos,* } *ss:*

Be it remembered that in the supreme court of the State of New Hampshire for the county of Coos, at the times hereinafter mentioned, among others, were the following proceedings:

10 At the trial term of said court, holden at Colebrook, within and for the northern judicial district of said county of Coos, on the first Tuesday of September, in the year of our Lord one thousand eight hundred and eighty-one, was entered the following petition:

To the supreme court next to be held at Colebrook, in and for the northern district of the county of Coos:

Comes E. S. Coe, of Bangor, in the county of Penobscot and State of Maine, and represents that on the first day of April, 1880, he owned, with others, all residents of the States of Maine and Massachusetts, a large number of spruce logs that had been drawn down the winter before from Wentworth's location and placed in Clear Stream and on the banks thereof, in the town of Errol, county

11 of Coos, and State of New Hampshire, to be from thence floated down the Androscoggin river to the State of Maine, to be manufactured and sold. And the selectmen of said Errol for that year appraised said logs for taxation at the price of six thousand dollars, and assessed thereon State, county, town, and school taxes, in the whole to the amount of one hundred and twenty dollars, and highway taxes to the amount of sixty dollars. And on the same first day of April, 1880, he owned, with one R. C. Pingree, of Lewiston, in the county of Androscoggin and State of Maine, a large amount of spruce, pine, and cedar logs, then in the Androscoggin river, in said Errol, which had been cut from lands in the State of Maine, and driven down through the Rangely lakes and rivers in Maine, and into the Androscoggin river in New Hampshire, and, on account of low water, had been left as aforesaid in said Errol

12 in the summer of 1879, and the same were on the way to mills owned by said Coe and Pingree, situated in said Lewiston, to be manufactured and sent to market. And the said selectmen of Errol appraised said last-named lot of logs for taxation at twenty-one thousand dollars, and assessed town, county, State, and school taxes thereon of the amount of four hundred and twenty dollars, and highway taxes of the amount of two hundred and ten dollars; and a tax-bill for all of said taxes is in the hands of the collector of said Errol for collection.

Said Coe further says, that on the first day of April, 1881, there

was a lot of spruce, pine, and cedar logs owned by him and others, all residents of said States of Maine and Massachusetts, that were drawn the winter before from said Wentworth's location, and
13 part of them were deposited on lands of John Akers and part on land of George C. Demeritt in said Errol; and said selectmen appraised the part on said Akers' land at two thousand two hundred and fifty dollars for taxation, and assessed town, county, State, and school taxes thereon of the sum of the sum of fifty-one dollars and 75 cents, and highway taxes of the sum of twenty-four dollars and seventy-five cents, and also appraised the lot of logs on land of said Demerritt for taxation at three thousand nine hundred dollars, and assessed town, county, State, and school taxes thereon the sum of eighty-nine dollars and 75 cents, and highway taxes forty-two dollars and 90 cents.

And said logs so on said Akers' and on said Demerritt's land were being taken by the owners on the way to Maine to be manufactured and sold. And on the same first day of April, 1881, he, with
14 said R. C. Pingree, owned a large amount of spruce, pine, and cedar logs then in the Androscoggin river, in said Errol, which had been cut in the State of Maine, and had been driven down through said lakes and rivers in Maine and into said river in New Hampshire, and on account of low water had been left as aforesaid in said Errol in the summer of 1880, and the same were on the way to said mills in said Lewiston to be manufactured and sent to market. And the said selectmen of said Errol appraised said last mentioned lot of logs for taxation at eighteen thousand dollars, and assessed town, county, State, and school taxes thereon to the amount of four hundred and fourteen dollars, and highway taxes to one hundred and ninety-eight dollars. And all of said taxes have been placed in the hands of the collector of said town of Errol for collection.

15 Said Coe further says that said logs of both years, so in the Androscoggin river, have each year been taxed as stock in trade in said Lewiston to said Coe and Pingree, and said Coe claims and represents that none of said logs were subject to taxation in said Errol for the reason that they were in transit to market from one State to another, and also because they had all been in other ways taxed.

That said Androscoggin river, from its source at the outlet of the and Umbagog lake in the State of New Hampshire, through said State through the State of Maine to said Lewiston, is now, and for a long time has been, to wit, for more than twenty years last past, a public highway for the floatage of timber from said lakes and rivers in Maine, and from the upper waters of said Androscoggin river and its tributaries in New Hampshire down said river to said
16 Lewiston, and has been thus used by the petitioner and his associates in the lumber business for more than twenty years last past.

That the petitioners and said others, owners of said logs thus taxed in said Errol,,have complied with all the requirements of chapter 55 of the General Statutes of New Hampshire, so far as the

same apply to non-residents of New Hampshire, and that this petition is preferred to this court within nine months after notice to said owners of said logs of the assessment of said taxes.

Said Coe therefore requests your hon. court to abate all of said taxes.

E. S. COE,
By WM. HEYWOOD, *His Att'y.*

[L. S.] STATE OF NEW HAMPSHIRE } ss:
Coos, }

In the supreme court, this petition for abatement of taxes having been duly filed in the office of the clerk of said court, this 25th day June, A. D. 1881, it is ordered that the said E. S. Coe notify the said Town of Errol to appear at the next trial term of said court to be held at Colebrook, in and for the northern judicial district of said county, on the third Tuesday of August, next, and answer the said petition by causing a true and attested copy of said petition and of this order of notice thereon to be given to one of the selectmen and the town clerk of said town of Errol, or left at the usual place of abode of each of them, at least 28 days prior to said last mentioned term.

It is further ordered, that said defendant, each of them, deliver to plaintiff's solicitor, his answer in writing to said bill within two calendar months after the service thereof; otherwise, said bill shall be taken as confessed.

M. A. HASTINGS, *Clerk.*

17 On the back of said petition is the following:

"Under authority of the def't we accept service on the within notice, and agree to answer to the petition.

July 2d, 1881. LADD AND FLETCHER,
Att'ys to Town of Errol."

"Filed June 25, 1881. M. A. HASTINGS, *Clerk.*"

18 THE STATE OF NEW HAMPSHIRE, } ss:
Coos, }

At the supreme court holden at Colebook, within and for the northern judicial district of said county of Coos, on the first Tuesday of September, in the year of our Lord one thousand eight hundred and eighty-two.

Present: The Hon. A. P. Carpenter, presiding justice.

E. S. COE, of Bangor, in the county of Penobscot and State of Maine, Plaintiff,
against
THE TOWN OF ERROL, in said County of Coos, Defendant.

In a petition for abatement of taxes at large, set forth in the petition on file.

This petition was entered at the September term, 1881. The

parties appeared, the questions of law arising on said petition were reserved by an agreed case and transferred to the law term
19 for the determination of the full bench, and said petition was continued from term to term, in this court, to this term. Now, at this term, the said questions of law having been fully determined in said law term, and an order made that that portion of said tax assessed upon the logs cut as aforesaid in said State of Maine be abated, and that the tax assessed upon all of said logs cut in the State of New Hampshire be sustained, and said order having been fully made known to the parties of this case and became a part of the record thereof, it is therefore ordered and decreed by the court that there be judgment in accordance with said order made at said law term, without costs to either party.

Attest: M. A. HASTINGS, *Clerk.*

Whereupon said plaintiff filed his bill of exceptions, which was allowed by the court as follows:

20 *Bill of Exceptions.*

STATE OF NEW HAMPSHIRE, *Coos County,* } *ss:*

Supreme Court. September Trial Term, 1882. Action.

E. S. COE *vs.* THE TOWN OF ERROL.

This is a petition for the abatement of taxes assessed by the defendant town on personal property of the petitioner and his associates, under the provisions of the statute laws of this State; which petition was entered in this court at the September trial term in said county, 1881, when the parties appeared and entered into an agreement as to the facts at issue in the case. And upon said agreed case this cause was transferred to the law term of said court held at Concord, within and for said State, on the first Tuesday of December, 1881, and was continued to the June law term of said court held at said Concord on the first Tuesday of June, 1882, when said cause was heard before said court. On said hearing the petitioner
21 claimed that said taxes named in the petition and the statutes of this State, under the provisions of which said taxes were assessed, were illegal and void, because said taxes were assessed in violation of, and said statutes of this State are in violation of and repugnant to the general provisions of the Constitution of the United States; because said taxes were assessed in violation of and said statutes of this State are in violation of and repugnant to that part of Section 2, Art. 4, of the Constitution of the United States, which provides that "The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States;" because said taxes were assessed in violation of and said statutes of this State are in violation of and repugnant to, those parts of Sec. 8 of Art. 1 of the Constitution of the United States, which provides that "The Congress shall have power * * * to regulate

22 commerce with foreign nations and among the several States;" and Sec. 10 of said Art. 1, which provides that "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

Said court at said last-named law term decided that the taxes assessed on the logs named in the petition that were cut in Maine were illegal, and should be abated, and that the taxes assessed on the logs named in the petition and cut in New Hampshire were legal, and that said last-named taxes should not be abated; that the assessment of said last-named taxes was not in violation of any provision of the Constitution of the United States, and that said statutes of this State are not in violation of or repugnant to any provision of the Constitution of the United States.

23 And now, at this term of said court, being the September trial term, 1882, within and for the northern district of said county, final judgment is entered upon said petition, in accordance with the decision and order of this court at the last-named law term.

And the petitioner excepted to said decision, so far as it relates to the taxes assessed on said logs cut in New Hampshire.

The petition and agreed case are referred to and made part of this bill of exceptions.

The foregoing exceptions are allowed.

Witness my hand and the seal of said court, this 6th day of September, 1882.

[L. S.] A. P. CARPENTER,
Presiding Judge.

On the back of said bill of exceptions is the following:

"Filed Feb. 6, 1882. M. A. HASTINGS, *Clerk.*"

24 *Agreed Case.*

In the Supreme Court for the Northern District of Coos County. Sept. Trial Term.

EBENEZER S. COE *vs.* THE TOWN OF ERROL.

This is a petition for the abatement of taxes founded on Secs. 11 & 12 of the Gen. Laws. The application to have the taxes abated was duly made to the selectmen of Errol, and they refused to abate the same, and then the petition was filed.

It is agreed that the facts set forth in the petition are all true except what is stated as to the taxation of the logs as stock in trade in Lewiston, Maine; and if that is regarded by the court as material, the case is to be discharged and stand for trial on that point. It is agreed that upon this petition the legality of the taxation is intended to be brought before the court for adjudication, and all formal objections to the proceedings in the town meeting, &c., and all

25 other matters of form are waived, and we submit the matter to the court for a legal adjudication as to whether or not any or all of the taxes shall be abated.

And it is agreed that for many years the petitioner and his associates in the lumber business have cut large quantitities of timber on their lands in Maine and floated them down the said lakes and rivers in Maine and down the Androscoggin river to the mills at said Lewiston; and timber thus cut has always lain over one season, being about a year, in the Androscoggin river, in this State, either in Errol, Dummer, or Milan; and the timber referred to in this petition as having been cut in Maine had lain over in Errol since the spring or summer before the taxation, according to the above custom.

E. S. COE,
By W. & H. HEYWOOD, *His Att'ys.*
TOWN OF ERROL,
By LADD & FLETCHER.

Case reserved.

C. DOE, *Presiding Justice.*

26 STATE OF NEW HAMPSHIRE, } *ss:*
Coos, }

I, M. A Hastings, clerk of the supreme court of the State of New Hampshire for the county of Coos, do hereby certify that the writings annexed to this certificate are true copies of their respective originals, on file and remaining of record in my office.

In testimony whereof, I have caused the seal of said court to be hereunto affixed, at Lancaster, in said county of Coos, this 23d day of September, A. D. 1882.

[SEAL.] M. A. HASTINGS, *Clerk.*

26½ [Endorsed:] E. S. Coe, pl'f, *vs.* The Town of Errol, def't in error. Copy of proceedings. Judgment & bill of exceptions.

27 Supreme Court of the United States.

E. S. COE, Plaintiff, }
vs } In Error.
THE TOWN OF ERROL, Def't. }

And afterwards, to wit, on the first Monday of December, in the December term, in the year of our Lord one thousand eight hundred and eighty-two, the said Town of Errol, by Ladd and Fletcher, its attorneys, freely comes here into court and says that there is no error either in the record or proceedings aforesaid, or in the giving of the judgment aforesaid, and they pray that the said Supreme Court of judicature, before the justices thereof, now here, may proceed to examine as well the record and proceedings aforesaid as the matters afosesaid above assigned for error, and that the judgment aforesaid, in for aforesaid given, may be in all things affirmed.

LADD & FLETCHER,
Att'ys for Def't in Error.

27½ [Endorsed:] E. S. Coe, pl'ff, *vs.* The Town of Errol, d'f't in error. Joinder in error.

28 In the Supreme Court of the United States, December Term, in the year of our Lord one thousand eight hundred and eighty-two.

E. S. Coe, Pl'ff,
vs.
The Town of Errol, Def't } In Error.

Afterwards, to wit, on the first Monday in December, in this same term, before the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, comes E. S. Coe, by W. & Henry Heywood, his attorneys, and says that in the record and proceedings aforesaid, there is manifest error in this, to wit: Because the taxes named in the petition and assessed on the logs cut in New Hampshire were illegal and void: First. Because said taxes were assessed in violation of, and the statutes of the State of New Hampshire, under which said taxes were assessed are in violation of, and are repugnant to the general provisions of the Constitution of the United States.

Second. That said taxes were illegal and void, because said taxes were assessed in violation of, and said statutes of the State of New Hampshire are in violation of, and are repugnant to that part of Section 2, Art. 4 of the Constitution of the United States
29 which provides that "The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States."

Third. That said taxes were illegal and void, because said taxes were assessed in violation of, and said statutes of the State of New Hampshire are in violation of, and are repugnant to those parts of Sec. 8 of Art. 1 of the Constitution of the United States which provides that "The Congress shall have power * * * to regulate commerce with foreign nations, and among the several States," and of Sec. 10 of said Art. 1, which provides that "No State shall, without the consent of Congress, lay any imports or duties on imports or exports except what may be absolutely necessary for executing its inspection laws." And the decision of the supreme court of the State of New Hampshire sustained said taxes assessed on said logs cut in said State of New Hampshire, and said court decided that said taxes were not void, because they were assessed in violation of, and that said statutes of the State of New Hampshire are not in violation of or repugnant to any provision of the Constitution of the United States, whereby was drawn in question the construction of certain clauses, and of the general provisions of the Con-
30 stitution of the United States, and the decision of the said supreme court of the State of New Hampshire was against the title, right, privilege, or exemption specially set up and claimed by the said plaintiff in error under the general provisions of and under said clauses of the Constitution of the United States. And said decision of the supreme court of the State of New Hampshire is in violation of and repugnant to said general provisions of and said clauses of the Constitution of the United States.

And the said E. S. Coe prays that the judgment aforesaid may be

reversed, annulled, and altogether held for naught, and that he may be restored to all things which he hath lost by reason of the said judgment.

W. & HENRY HEYWOOD,
For the Pl'f in Error.

31 [Endorsed:] E. S. Cole, pl'f, *vs.* The Town of Errol, def't. In error. Assignment of errors.

32 *Copy of Docket Entries.*

Coos, *ss:*

Supreme Court, September Trial Term, 1881.

"E. S. COE *vs.* THE TOWN OF ERROL.

W. & H. Heywood. Ladd & Fletcher. Petition for abatement of taxes. Leave to amend petition granted. Hearing reserved. Continued."

December Law Term, 1881.

"E. S. COE *vs.* TOWN OF ERROL.

W. & H. Heywood. Ladd & Fletcher. Doe, C. J., does not sit. From Sept. T. T., 1881. Copies dis. Sept. 12, '81. Hearing. Continued."

February Trial Term, 1882.

"E. S. COE *vs.* TOWN OF ERROL.

W. & H. Heywood. Ladd & Fletcher. Ray, Drew & Jordan. Sept. '81. Leave to amend pet'n granted. Transf. on agreed case. Continued."

June Law Term, 1882.

"E. S. COE *vs.* TOWN OF ERROL.

W. & H. Heywood. Ladd & Fletcher. Doe, C. J., does not sit. Hearing. Submitted. Tax on logs cut in Maine abated. Tax on logs cut in N. H. good. Pl'f excepts."

33 September Trial Term, 1882.

"E. S. COE *vs* TOWN OF ERROL.

W. & H. Heywood. Ladd & Fletcher. Roy, Drew & Jordan. Judg't in accordance with order made at law term. Pl'f excepts. Pl'f & def't both move for costs. No costs to either party. Pl'f has leave to file exceptions as of term."

Coos, *ss:*

The foregoing is a true copy of the docket entries made in said action.

Attest: [SEAL.] M. A. HASTINGS, *Clerk.*

[Endorsed:] Coe *v.* Errol. Copy of docket entries.

Endorsed on cover: New Hampshire supreme court. No. 304. E. S. Coe, plaintiff in error, *vs.* The Town of Errol. Filed 5 October, 1882.

116-517

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 304.

E. S. COE, PLAINTIFF IN ERROR,

vs.

THE TOWN OF ERROL.

BRIEF FOR PLAINTIFF IN ERROR.

Democrat Print, Lancaster, N. H.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 304.

E. S. COE, PLAINTIFF IN ERROR,

vs.

THE TOWN OF ERROL.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

It appears that E. S. Coe the plaintiff in error, of Bangor in the state of Maine, with other parties, all residents of Maine and Massachusetts, were on the first day of April, 1880, the owners of a large amount of spruce timber, that had been drawn the winter before from Wentworth's Location and placed in Clear stream, in said town of Errol, to be thence floated down the Androscoggin river to the State of Maine, to be manufactured and sold. That the selectmen of Errol for that year appraised said logs for the purpose of taxation, snd assessed state, county, town, and school taxes thereon to the amount of one hundred and twenty dollars and highway taxes to the amount of sixty dollars. That on said first day of April 1880, the Petitioner, with one R. C. Pingree of Lewiston, Maine, were the owners of a large amount of spruce, pine, and cedar logs, then in the Androscoggin River, which had been cut from lands in Maine and driven down through the Rangely Lakes and rivers in Maine and into the Androscoggin River in New Hampshire, and, on account of low water, had been left in Errol in the summer of 1879. That said last named logs were then on their way to the mills of said Coe and Pingree, in said Lewiston, to be manufactured and sent to market. And the selectmen of Errol appraised the last named logs for the purpose of taxation, and assessed town, county, state, and school taxes thereon to the amount of four hundred and twenty dollars and highway taxes to two hundred and ten dollars.

That on the first day of April 1881, said Coe and his partners were the owners of another large lot of logs that had been cut during the previous winter and drawn from said Wentworth's Location and deposited on the lands of one Akers and one Demeritt in said Errol and said logs were then being taken by the owners on their way to Maine to be manufactured and sold. And the selectmen of Errol appraised these logs for the purpose of taxation and assessed town,

county, state, school, and highway taxes thereon, in all amounting to two hundred, eight dollars and sixty-five cents. That on said first of April 1881 said Coe and Pingree were the owners of another large lot of logs then in said Androscoggin River in Errol, which had been cut in Maine and had been driven down through said lakes and rivers in Maine into said Androscoggin River in New Hampshire, and, on account of low water had been left in said Errol as aforesaid in the summer of 1880 and said logs were then on their way to the mills in said Lewiston to be manufactured and sent to market. And the selectmen of said Errol then appraised the last named logs for the purpose of taxation and assessed town, county, state and school taxes thereon to the amount of four hundred and fourteen dollars and highway taxes, one hundred and ninety-eight dollars.

That said Androscoggin River, from its source at the outlet of the Umbagog Lake in New Hampshire, through said state and through the state of Maine to Lewiston is a public highway for the floatage of timber from said lakes and rivers in Maine and from the upper waters of said Androscoggin River and its tributaries in New Hampshire down said river to said Lewiston, in the state of Maine. And said river has been thus used for a public highway for more than twenty years prior to the filing of the petition in this cause.

That said owners of the logs thus taxed in said Errol, have complied with all the requirements of chapter 55 of the General Statutes of New Hampshire so that the petitioner would be entitled to an abatement of said taxes under the provisions of the statute of New Hampshire.

That an application to have said taxes abated was duly made to the selectmen of Errol and they refused and the petition was then filed in the state court to have the taxes abated under the provisions of the General Laws of New Hampshire Chapter 57 Sections 11 and 12. Upon said petition it was agreed by the parties that the legality of said taxation is intended to be brought before said state court for adjudication and all formal matters were waived. And it was further agreed that the petitioner and his associates in the lumber business for many years have cut large quantities of timber on their lands in Maine and floated it down said lakes and rivers in Maine and down the Androscoggin River, to the mills at said Lewiston; and the timber thus cut has always lain over one season, being about a year in the Androscoggin river, in this state, either in Errol, Dummer or Milan; and the timber referred to in the petition as having been cut in Maine had lain over in Errol since the spring or summer before the taxation, according to the above custom. [It will be seen by referring to the petition on pp 3 and 4 printed record that the logs lay over on account of low water in the river, and this is an admitted fact see the agreement p 7.]

Upon said petition in the Supreme Court of New Hampshire it was claimed by the petitioner that said taxes were assessed and that the statute of the state under the provisions of which they were

assessed, are illegal and void, because the taxes were assessed in violation of, and said state statutes are in violation of and repugnant to the general provisions of the Constitution of the United States. Second. Because said taxes were assessed in violation of and said statutes of said state are in violation of and repugnant to that part of Section 2, Article 4 of the Constitution of the United States which provides that "The citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states."

Third. Because said taxes were assessed in violation of, and said statutes of the state are in violation of, and repugnant to those parts of Section 8 of Article 1 of the Constitution of the United States which provides that "The Congress shall have power * * * to regulate commerce with foreign nations, and among the several states," and Section 10 of said Article 1, which provides that "No state shall, without the consent of Congress, lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws." And it was decided by said Supreme Court of the state that the said taxes assessed on said logs cut in Maine were illegal, and should be abated, and that the taxes assessed on the logs named in the petition and cut in New Hampshire were legal, and that said last named taxes should not be abated; that the assessment of said last named taxes was not in violation of any provision of the Constitution of the United States, and that said statutes of the state are not in violation of or repugnant to any provision of the Constitution of the United States. And thereupon a final decree was entered in said court accordingly and the petitioner filed his bill of exceptions to the decision of the state court so far as it relates to said taxes assessed on the logs cut in New Hampshire and has taken his writ of error to this court.

By looking at the map of Maine and New Hampshire the court will see that the said Rangely lakes is a chain of lakes lying in the easterly part of Maine in Oxford and Franklin counties and their waters flow from the Umbagog Lake on the state line in Errol N. H., through the Androscoggin river in a circuitous course for about fifty miles in New Hampshire and then passes into the state of Maine. That said Wentworth's Location is the adjoining township north of Errol.

The Clear Stream being a small tributary of the Androscoggin river running from the east and entering said river in Errol. That there is a large tributary called the Magalloway River rising in the north easterly part of Maine running southerly, crossing the state line into said Wentworth's Location and entering the Androscoggin River near its source in Errol, thus making a very large water course in Maine and New Hampshire that has its outlet through said last named river into Maine and thence to the ocean at Bath, Maine. And upon these lakes and tributaries of said river in Maine and New Hampshire a very large amount of timber is cut each winter and driven down these waters upon the spring freshets as far as it will go

the first year and the next spring the waters of the freshet take it forward again to its destination in Maine. The detention of the timber in New Hampshire during the period it lays over in New Hampshire being the natural result of the low water in the river during the drought of the summer and fall and that the river is closed by ice through the winter

POINTS OF LAW.

The statute under which this taxation was made are Sections 13, 14, 15, and 16 of the General Laws of New Hampshire Chapter 54.

Section 13 provides for the taxation of logs and lumber exceeding fifty dollars in value in the town where it is on the first day of April to the owner, if he is a resident of the town, otherwise to the owner or person having it in his care or custody on said day and any person permitting such property to be laid upon his premises shall be deemed to have the care and custody of the same, and such person is given a lien on the same for the payment of such taxes. And when such property, liable to be taxed, is owned by a person residing out of the town where it is situated on the first day of April and is not in the custody of any person residing in the town it is to be taxed to the owner and the town is given a lien thereon for the payment of the taxes. Section 14 provides for notice to the person having the care and custody of the property before it is taxed to him under the provisions of Section 13.

Section 15 provides that where such property is in any town, other than that in which it is cut, on the first day of April, on its way to market. or temporarily delayed therein on its way to market, if the owner residing in the state, furnishes to the seleetmen or assessors of such town certain specified evidence that the property has been given in by said owner for taxation during that month in the town where the owner resides, it shall be there taxed.

And Section 16 provides that timber, logs and lumber lying in or upon any body of water in this state, outside the boundary or limits of any town in the state, shall be taxed in the town nearest and opposite such property.

It will be seen by an examination of the provisions of these state statutes that all timber, logs and lumber that may be within the state on the first day of April is included within these provisions, although such property is at the time the subject of interstate commerce.

And it is in this view of those statutes that we claim said statutes to be in violation ofand repugnant to the general provision of the Constitution of the United States and the specific provisions of said Constitution above cited. And that the taxes in question assessed on the logs cut in New Hampshire were assessed in violation of said Constitution and said specific provisions. The logs in question, at the date of taxation, were in transit from the state of New Hampshire upon a great natural water thoroughfare, in the ordinary course of

transporting such property, to the place of manufacture in the neighboring state of Maine, and the legal *citus* of such property for the purpose of taxation was not in the state of New Hampshire, but in Maine where the owners then had their place of business and of which state they were then residents and where as we claim the property was in fact legally taxed as stock in trade, and a taxation of the same property in New Hampshire can not be considered reasonable, it would be double taxation and not proportional.

That the legal *citus* of this property, for the purposes of taxation, is not in the town or place where the property, thus in transit happens to be on the first day of April or other date of taxation, see

Conley vs Claudic, 7 Nev., 336
Parker Mills vs Tax Commissioners, 23 N. Y., 245
Ellsworth vs Brown, 53 Me., 519
Campbell vs Machias, 33 Me., 419
Burrows on Taxation, chapter 4, sections 48-50
Cooley on taxation, p 269.

The case cited from the Maine reports show that by the statute of Maine, the logs taxed in Errol, were subject to taxation at Lewiston Where the owners occupied a mill and one of them resided. For the purposes of taxation Lewiston was the legal *citus* of this personal property.

Desmond vs Machias Port, 48 Me., 478
Revised Statutes of Maine, p 131 sections 13 and 14, chapter 182 laws of 1877.

To sustain a taxation of the same property in New Hampshire must lead to double taxation and the statutes attempting to authorize such taxation is in conflict with the Constitution of New Hampshire.

Opinion of the Justices, 4 N. H., 565

Upon the facts of this case we claim that this taxation is in conflict with the United States Constitution.

The resident owner of personal property in the state of New Hampshire, has the right to use the public rivers of the state for the purposes of navigation without subjecting his property to the burden of double taxation. The Constitution of said state secures him against such double taxes. It is the privilege of the citizen of said state to use the public rivers and highways of the state for the purposes of transporting himself or property and that privilege or right is secured by the federal constitution to the citizens of the several states upon equal terms.

Article 4 Section 2: "The citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states."

To hold that the property of a citizen of Maine in transit through New Hampshire upon one of our public water courses and legally liable to taxation in Maine, is also liable to taxation in New Hampshire, would not be according to the citizen of Maine, the privilege of the citizen of New Hampshire, and the state statutes attempting to authorize such taxation of the property of the citizen of Maine is to

that extent in violation of the provision of the federal constitution just cited.

Cooley on taxation, chapter 3, page 64
Oliver vs Wash. Mills, 11 Allin, 268

In Crandall vs Nevada 6 Wall. 35 held a state law assessing a tax on passengers through the state void. For the same reasons given in that case the citizen of another state has the right to transport his property from or through the state of New Hampshire upon its public highways by land or water without subjecting it to taxation in New Hampshire.

Brown vs Maryland, 12 Wheat., 419
Ward vs Maryland. 12 Wheat., 418
Guy vs Baltimore, 100 U. S., 434.

In Paul vs Virginia 8 Wall 168 it was held that "The privileges and immunities secured to citizens of each state in the several states, by this clause, are those privileges and immunities which are common to the citizens of the latter state, *under their constitution and laws* by virtue of their being citizens." The free and equal use of the public highways within a state must be among such privileges and immunities. And in Guy *vs* Baltimore 100 U. S. at page 439 after a review of cases Harlan J. says: "In view of these and other decisions of this court it must be regarded as settled that no state can, consistently with the Federal Constitution, impose upon the products of other states brought therein, or the transportation thereto of the products of other states, more onerous public burdens or taxes than it imposes upon like products of its own territory."

We claim that the state of New Hampshire is restricted in like manner in the taxation of the logs cut on Wentworth's Location and owned by citizens of the state of Maine and being transported from New Hampshire to the state of Maine, said owners are secured in their rights by the Federal Constitution upon equal footing with citizens of New Hampshire. The state of New Hampshire, under the guise of taxing such property within that state do in fact subject it to the liability of double taxation both in New Hampshire and in Maine when the legal *citus* of the property is in Maine and the property is legally liable to taxation there and not in New Hampshire provided property in transit and the subject of interstate commerce can be taxed by any state and our argument above is made upon the general subject of *citus* of personal property for the purposes of taxation and subject to this proviso.

We further claim that any taxation, under the laws of any of the states, of this property at the time of the taxation being the subject of interstate commerce is in violation of the provisions of Article 12 Section 8, par. 3 of the United States Constitution by which, power is given to Congress "to regulate commerce * * * among the several states," and of Section 10 par. 2, "No state shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." It has uniformly been held by the Supreme Court of the United States that a tax assessed under a state law, upon property being in transit through the state, or from a point in the state to another state, is in violation of these last provisions of the United States Constitution, or rather as we understand it, in violation of the above cited provision giving Congress power "to regulate commerce * * * among the several states.

Case of the State Freight Tax, 15 Wall., 232
Almy vs California, 24 How., 169
Woodruff vs Parham, 8 Wall., 123
Steamship Co. vs Port Wardens, 6 Wall., 31
Wilton vs Missouri, 91 U. S., 275
R. R. Co. vs Husen, 95 U. S., 465
Cook vs Pennsylvania, 97 U. S., 566.

Wherever the subject in regard to which a power to regulate commerce is asserted, are in their nature national or admit of one uniform system or plan of regulation they are exclusively within the regulating control of Congress. Transportation of merchandise through a state, or from one state to another are of this nature.

State Freight Tax, 15 Wal., 232
Hall vs DeCuir, 95 U. S., 485.

"The power to regulate commerce among the several states, was vested in Congress in order to secure equality and freedom in commercial intercourse against discriminating state Legislation."

Field Justice in Railroad Co. vs Richmond, 19 Wall., 589
Wilton vs Missouri, above cited
Webber vs Virginia. 103 U. S., 344.

The non exercise by Congress of its power to regulate commerce among the states, is equivalent to a declaration by that body that such commerce shall be free from any restriction.

Wilton vs Missouri, 91 U. S., 275.

It will be said that these taxes, as is said by Blodgett J in the opinion in this case in the state court, is no attempt to regulate com-

merce upon the Androscoggin River passing from New Hampshire into Maine, and the like in relation to the Connecticut and other large rivers in the state, but is a tax upon property in fact located within the state and legally taxable there. The answer to this position is the practical effect of taxes assessed under state laws upon property thus situated. Admit the power of the state to assess taxes upon property in transit between the states, and interstate commerce will be regulated by state taxation irrespective of any laws or regulations Congress can devise for that purpose, under the power given by the constitutional provision just cited. This position has always been taken to sustain state taxation and has been answered by the Supreme Court substantially the same vis: by Strong Justice in the case of the State Freight tax, 15 Wall., 272. "It has repeatedly been held that the constitutionality or unconstitutionality of a state tax is to be determined, not by the form or agency through which it is to be collected but, by the subject upon which the burden is laid. The same has been decided in the following cases:

Bk of Com. vs N. Y. city, 2 Black, 620
The Bk tax case, 2 Wall., 200
Soc. for Savings vs Coite, 6 Wall., 594
Providence Bk vs Mass., 6 Wall., 611
Brown vs Maryland, 12 Wheat., 419
Henderson and al, vs Mayor of N. Y. city, 92 U. S., 259.

The case of State vs Eagle, 34 N. J. L., 425 is in point upon this branch of our case. The N. H. statute like the N. J. statute in question in that case was intended to reach property in transit through the state, for the purpose of taxation in the state. The court in that case recognizes the power of the state to tax property which has not become the subject of interstate commerce (as was the fact in Currier vs Gordon, 21 Ohio St. 605) or which has been the subject of interstate commerce and has become mingled with other property of the state. In relation to property in transit through the state the court says "But that a tax on the property belonging to a citizen of another state, in its transit to market in other states, which is delayed in this state not for the purpose of sale but merely for separation and

assortment for convenience of shipment to its destination, is a tax upon commerce among the states, is too plain for argument."

The facts sustain our position that the logs now in question were legally in transit from a point within the state to Lewiston, Me., there to be manufactured for the market. At the diferent dates of the taxation the logs were the subject of interstate commerce. The logs for each year had been cut on Wentworth's Location the winter prevlous to the taxation and drawn down to Erroll and there left to go forward on the spring freshet to Lewiston. The fact that they had been moved but a few miles on their transit to Maine does not change the fact, or that they were delayed for some period of time in Errol, the case now stands the same that it would if these logs had gone forward for a hundred miles within the state of N. H. in their transit to Maine and there, from some natural cause, been delayed or have been delayed for the conveniences of navigation or transportation for a long or short time, the matter of time of delay being immaterial.

The important fact is that the transit from the state to another state has begun and a temporary delay on its way does not terminate the transit. The property is all the time while in motion or at rest in transit and is the same during the whole time of its transit the subject of interstate commerce. Just as much so as the logs that come from Maine, or as these Wentworth Location logs would have been had they started from that Location just prior to the first day of April and had passed through the town of Errol on the spring freshet on the first day of April.

The case of Parker Mills Co. vs Commissioners, 23 N. Y., 242 answers this position as we claim it should be answered that because property, of non residents, within one of the states for the purposes of sale or transportation to market, happens to be delayed for a long period does not render it liable to taxation in that state. And property thus the subject of interstate commerce cannot be taxed to the owner of that property in case the owner is a resident of the state or place where the property is situate on the date of the taxation. The question of residence of the owner of the property and the legal *citus* of the property has nothing to do with the question now under

consideration but the point is, that the federal constitution prohibits the state from interfering with interstate commerce by way of taxation and here is just where our state court made its error in the discission in this case. The state court assumed that the residence of the owner of the property and the legal *citus* thereof was the determining point in this branch of the case.

It has been recently decided by the Supreme Court of N. H., that the petition for abatement given by the statute is the only relief the property owner has in that state against an illegal assessment, which is not fraudulently made.

Edes vs Boardman, 58 N. H., 580

And in our case we were denied the right to an abatement of the taxes upon the ground that the assessment was not in any manner in violation of any provision of the United States Constitution.

So it cannot be said that this is not a proceeding to which we are entitled to a writ of Error to this court.

This is a proceeding wherein the petitioner claims a right or immunity under the U. S. Constitution and that right or immunity has been denied him by the state court, coming clearly with Section 709 Rev. St. U. S. giving the writ of Error.

HENRY HEYWOOD,
Counsel for Plaintiff in Error.

116-517

SUPREME COURT OF THE UNITED STATES.

October Term, 1884.

E. S. COE, PLAINTIFF IN ERROR,

v.

THE TOWN OF ERROL.

BRIEF FOR THE DEFENDANTS.

SUPREME COURT OF THE UNITED STATES.

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THE TOWN OF ERROL.

BRIEF FOR THE DEFENDANTS.

No argument can be based on the assumption that the logs were taxed in Maine, for several reasons:—(1) It makes no difference whether they were taxed there or not. (2) In point of fact, they were not taxed there. (3) The agreed statement, upon which the opinion of the New Hampshire court was rendered, expressly stipulates that if that fact should be found material, one way or the other, the case should be discharged for the purpose of having it ascertained by a trial, which was never done. See the opinion of the New Hampshire court appended hereto.

The legal fiction, that personal property follows the person of the owner, does not override the power of a state to lay a tax upon property that has always in fact been within its jurisdiction, and under the protection of its laws. This property consisted of the trunks of timber trees grown upon the soil of New Hampshire, which, during the winter before the time fixed by law for the assessment of taxes on all property in the state (April 1), had been severed from the soil and moved a short distance to the bank of a tributary of the Androscoggin river, with the intent on the part of the owner, when the spring freshet came, to transport them by way of the river to his mills in Maine, there to be manufactured into lumber and sold. They were just as much within the jurisdiction of the state, just as much a part of its property, and just as much entitled to the protection of its laws, after being cut and hauled a short distance to the bank of Clear Stream, as though they had been left standing where they grew until April 1. And the intention of the owner to carry them into the state of Maine, and there saw them up into lumber and sell them, was no more certain and fixed after they were cut than before. Indeed, if a fixed intention to make merchandise of a thing at some place outside the state where it is in fact situated is sufficient to put the thing beyond the taxing power of the state, these trees were undoubtedly withdrawn from the jurisdiction of New Hampshire in that respect

when the plaintiff, years ago, bought the land on which they grew for the purpose and with the intention of stocking his mills in Maine with timber therefrom to be manufactured and sold in markets outside New Hampshire. The truth is, no reason has been suggested, and none exists, why this property, which was receiving and was entitled to the protection of the laws of New Hampshire on the first day of April, ought not to bear its just and ratable proportion of the burden of supporting the government of New Hampshire the same as other property of the same kind in the state situated in the same way. And there is nothing in the law of the land, or in the constitution of the United States, which forbids it. See authorities referred to in the opinion subjoined.

It seems to be claimed that the statute under which this tax was laid discriminates against the citizens of other states. A glance at the statute shows that this claim is without the shadow of a foundation in fact. It is perfectly general in its terms, and applies to all property thus situated alike, with absolute equality, and without the slightest reference to the residence of its owner.

It is further claimed, that the statute, in its application to these logs, amounts to a regulation of commerce among the states, and so comes within the implied prohibition of that clause of the constitution which invests congress with the power to regulate such commerce. In the light of all the cases decided by this court which bear upon the question so raised, it seems to be a complete answer to this claim to say that the tax in question was in no sense a tax upon transportation, and was not laid because the property was intended for transportation, or was in process of transportation beyond the state, but was simply a tax upon property which up to that time had constituted an integral portion of the wealth of the state, levied at the same time, in the same way, and for the same purpose as all other taxes, to provide a revenue for the support of the municipal government of the state.

Many authorities in support of this position are referred to in the opinion annexed, and need not be repeated here. They show abundantly that it cannot be regarded in any just sense as an attempt by the state to regulate commerce among the states.

In point of fact, a very large proportion of the timber trees cut in northern New Hampshire in the winter season, and hauled a short distance to the bank of some floatable stream, to lie, as in a storehouse, until the melting of the snow furnishes water to carry them down the current, are intended to be sawed into lumber at mills of the owners within the state, and then to be carried beyond the state for a market, either abroad or in some other state of the Union. Could it be held that when they are thus started a little towards their destination they are withdrawn from the taxable property of the state, and shielded against bearing their proportion in the support of the government which affords them protection by the provision of the United States constitution under consideration? No distinction in principle between the case supposed and the present case can be pointed out. If they are so *in transit* that a tax on them will

be a regulation of commerce in one case, it will be in the other; for in both cases they have been moved from the stumps on which they grew, and in both, also, their ultimate destination is beyond the state. If logs situated as these were, on the first of April, 1880 and 1881, cannot be taxed, it must follow that wheat or hay, or any other farm product, which has been raised and harvested in New Hampshire and moved from the land where it grew to a storehouse, and there kept over the regular taxing time, with the intention on the part of the owner to carry it beyond the state for a market when the proper time arrives, cannot be taxed. And thus the doctrine contended for would deprive the state of one large and legitimate source of its ordinary revenue, and increase the burden upon other property far beyond its just and ratable proportion for the support of the government. Furthermore, it would put it in the power of any person having such products for sale to escape taxation therefor by seeking his market outside the state instead of within it, thus making a clear profit of the amount of the tax at the expense of his neighbors.

The case of the State Freight Tax, 15 Wall. 232, recognizes fully the doctrine contended for above; and the decision is put clearly on the ground "that no state can impose a tax upon freight transported from state to state, or upon transportation *because of such transportation.*"

LADD & FLETCHER,
For the Defendants in Error.

Board of Counsel

OPINION OF SUPREME COURT OF NEW HAMPSHIRE.

BLODGETT, J. The petitioner who is a resident of Bangor, in the state of Maine, asks for an abatement of the taxes assessed by the town of Errol in April, 1880, and in April, 1881, upon a lot of logs in said town, of the value of some $6,000, which had been cut and drawn there during the preceding winters from Wentworth's Location, and which were owned by himself and other non-residents. It is alleged in the petition and admitted to be true, that at the time the assessments were so made the logs "were being taken by the owners on the way to Maine, to be manufactured and sold;" and the claim of the petitioner is, that they were not subject to taxation in said Errol, "for the reason that they were *in transit* to market from one state to another, and also because they had all been in other ways taxed." No facts appear tending to support the last reason, and it therefore requires no consideration.

The assessments were made under s. 13, c. 54, Gen. Laws, which provides that wood, bark, timber, logs, and lumber, manufactured or other, exceeding fifty dollars in value, shall be taxed at its full value in the town where it is on the first day of April. The constitutionality of this provision when applied to resident owners is not denied, so that practically the question is, whether non-resident owners of

such property have, in respect to taxation, greater rights, privileges, and immunities than are possessed by our own citizens. And we hold without hesitation that they have not.

The consideration upon which taxation is based is the protection of the government to rights of persons, or to rights of property, and taxes may consequently be imposed when either person or property is within the jurisdiction. Cooley on Taxation, 14. But taxation and protection being reciprocal, it follows that a personal tax can only be assessed on residents, and for the same reason and for the additional one, that by a fiction of law, personal property is supposed to accompany the owners, and for many purposes is deemed to have no *situs* except that of his domicile, and properly cannot be taxed unless it has an actual *situs* within the state where the tax is assessed, and hence is not taxable in a state through which it is merely passing.

Subject to this qualification, it is well settled that it is competent for any state to provide that tangible personal property situate within it may be taxed there irrespective of the residence of the owner. Cooley, before cited, and authorities, among which are: Green v. Vanbuskirk, 7 Wall. 139, 150; Company v. Blakstone, 13 Gray 488; Seward v. New Bedford, 16 id. 292; Hartland v. Church, 47 Maine 169; Desmond v. Machias, 48 id. 478; Catlin v. Hall, 21 Vermont 152; Mills v. Thornton, 26 Ill. 300; St. Louis v. Ferry Co., 40 Mo. 580; Rieman v. Shepherd, 27 Ind. 288; Steire v. Walling, 7 R. I. 317; Hoyt v. Commissioners, 23 N. Y. 224; People v. Ogdensburg, 48 id. 390; Hood's Estate, 21 Pa. St. 106, 114; Maltby v. Reading R. R. Co., 52 id. 140; State v. Falkinburger, 15 N. J. 329.

Now it is perfectly obvious that the trees from which the logs were cut had an actual *situs* in this state, and, in connection with the land upon which they stood, rightfully constituted a part of its wealth and taxable property. It is true that the land may have belonged to one person and the trees to another, but this plainly could not affect the right of taxation, although in law trees may be as effectually severed from the soil by deed as by an actual severance, and become personal estate in the hands of the grantee, the same as if he bought them after they were severed in fact; nor could the right be affected by the fact that the owner of one or both was non-resident, "because for the purpose of taxation the actual *situs* controls, and the fiction which carries the personal property to the domicile of the owner is to be disregarded." Graham v. Bank of Norfolk, 38 Am. Rep. (84 N. Y.) 532. When, then, did the trees cease to have an actual and legal *situs* in this state and to be under the protection of our laws? Manifestly not until they had passed beyond its borders. This is so palpable as not to require a moment's consideration, and is in strict accordance with every just principle of taxation.

But it is urged that inasmuch as the logs were *in transit*, and seeking a market in another state, the tax imposed was upon commerce, and therefore is in conflict with the constitution of the United States.

If the logs had belonged to a resident here they would clearly have been taxable, and in equity it can make no conceivable difference that the owner was non-resident, and hence the tax should be sustained if

possible. But the objection is readily and conclusively answered without resorting to equitable considerations, because the law under which the tax was assessed obviously cannot be deemed a regulation of commerce between states. At most, it simply acts upon and affects property which may be the subject of commerce. But a tax on property that may be the subject of commerce under congressional regulation, is not a tax on commerce, but on property. Cooley before cited, 62. Scott & a. v. Wilson, 3 N. H. 321, 326. Neither is a tax on property that has been the subject of commerce, where it is taxed only as property, and is common with all other property within the state. Brown v. Maryland, 12 Wheat. 419, 437; Purvear v. Commonwealth, 5 Wall. 475, 479; Waring v. The Mayor, 8 id. 110. Our conclusion then is, that the logs in question, having at the time of their taxation an actual and legal *situs* in this state, and having been taxed only as property, and in common with all other property, under a law making no discrimination in respect of ownership, no provision of the state or national constitution was violated, and that no case is made for relief.

The petitioner also asks for an abatement of the taxes assessed by the same town and in the same years upon a lot of logs owned by himself and one Pingree, another non-resident, which had been cut in Maine and driven through the Rangely lakes and rivers in Maine and into the Androscoggin river in this state, and while on their way to mills owned by himself and Pingree in Lewiston, Me., had, on account of low water, been left in Errol in the summers of 1879 and 1880. The petition also sets forth that the Androscoggin river then was, and had been for more than twenty years, a public highway for the floating of timber and logs from said lakes and rivers in Maine, down said river to Lewiston, and had been so used by the petitioner and his associates for more than twenty years last past.

The facts stated very clearly show that the logs were brought into this state in the usual course of transportation, and remained here no longer than was necessary under the circumstances. They were merely passing through the state, and therefore were not taxable in this jurisdiction. Conn. River Lumber Co. v. Columbia. The result then is, that the tax on the logs cut in Maine is ordered to be abated, while that assessed upon those cut in this state is sustained.

116-517

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 304.

E. S. COE, PLAINTIFF IN ERROR,

vs.

THE TOWN OF ERROL.

BRIEF IN REPLY FOR PLAINTIFF IN ERROR.

IN THE SUPREME COURT OF THE UNITED STATES.

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BRIEF IN REPLY FOR PLAINTIFF IN ERROR.

The Defendant's counsel in their brief, contend for the position taken in the opinion given in the State Court, that the *situs* of the property taxed is the governing question in the case. We contend that this position is erroneous and that the residence of the owners is immaterial upon the question whether the tax complained of is in violation of the provision of the constitution of the United States, in relation to inter-state commerce. Had the owners of the property been residents of New Hampshire there would be no distinction between the *legal* and the *actual situs* and it is only upon our first position taken in our brief that we claimed in the State Court that the residence of the owners of the property had any bearing upon the legality of the tax in question. We assent to the rule that personal property may be governed by the laws of the state where it is in fact situated in relation to attachments, mortgages, etc., and in ordinary cases for the purposes of taxation, where its *actual situs* is its permanent location, as in the case of an inhabitant of one state owning a farm or having other permanent business in another state, the personal property there situated in connection with that business is legally liable to taxation in the state where it is in fact located, where the owner of the property has the protection of the laws of the state for the security of his property. As we understand it this is the character of the case Green vs Vanbuskirk, 7 Wal. 150, and other cases cited by Blodgett, J. in his opinion presented in the Defendant's brief.

But to this general rule that personal property shall be taxed where it has its actual *situs* and where it has the protection of the laws of that jurisdiction, there is this well established exception created by the provision of the United States constitution giving to Congress the power to regulate commerce, inter-state as well as foreign. And it has always been held that personal property at the time the subject of inter-state or foreign commerce can not be taxed under the laws of a state where it may happen at that time to be. A state law

and taxation under it of personal property thus the subject of foreign or inter-state commerce has always been held to be in conflict with the United States constitution by this court and usually by the state courts.

The case Conley vs. Chedic, 7 Nev. 336, is an illustration of our position, the wood there in question was situated in the state of Nevada and under the ordinary rule of law would be a subject of taxation under the laws of the state where it was situated, but in that case the wood had been cut in the state of California and was being floated down the river into Nevada and was then the subject of inter-state commerce and the tax was illegal. This makes an exception to the general rule and the residence of the owner or the actual *situs* of the property are not the elements that govern in the determination of this exception to the general rule. The governing element that determines whether the property comes within the exception, is the fact as to whether the property is the subject of commerce foreign or inter-state. If it is the constitutional provisions apply to it and Congress has the exclusive power over it, and state legislation cannot interfere with it. It makes no difference what the form of the state legislation may be. It is the substance of the matter and not the form that this court has always been zealous to consider, see

Strong J. 15 Wal. 272 before cited by us.

It may be a license upon the importer

Brown vs. Maryland, 12 Wheaton 436.

and a state law imposing a license upon all persons engaged in inter-state commerce like the present license law of New Hampshire would stand the same.

Wilton vs. Missouri, 91 U. S. 275.

It may be a tax upon passengers as in

Crandall vs. Nevada, 6 Wall. 35.

A direct tax upon the property then the subject of commerce.

Parker Mills vs. Commissioners, 23 N. Y. 245.

Wilton vs. Missouri, 91 U. S. 275.

Cook vs. Pennsylvania, 97 U. S. 566.

A tax upon the transportation of freight between different states case of

State Freight Tax, 15 Wal. 232.

A stamp duty on bills of lading,

Almy vs. California, 24 How. 169.

A fee given to wardens of a port upon every vessel arriving in port.

Company vs. Port Wardens, 6 Wal. 31.

All such taxes when they are levied upon the subjects of commerce under state laws, are void. And it does not change the result where the tax is direct upon the property or indirect as by a license or otherwise. Judge Blodgett attempts to sustain this tax as a tax upon the property and not any regulation of commerce, but in Wilton vs. Missouri, the tax was sustained by the state court upon the ground

that it was a license of an occupation, *Field, Justice*, in the opinion of the court, held the tax to be a tax upon the property and because it was a tax upon property the produce of another state, offered for sale in Missouri, therefore the tax is void, and so we say here that the tax can not be sustained as a tax upon personal property within the state, because it is a direct tax upon the property because such tax would interfere with inter-state and foreign commerce, could the states pass laws to tax property at the time of the taxation, the subject of commerce either foreign or inter-state. All taxes direct or indirect, upon the property or person engaged in commerce, assessed under state legislation, interfere equally with the power given to Congress to regulate commerce.

Marshall C. J., in Brown vs. Maryland, 12 W., 448.

"The distinction between a tax on the thing imported and on the person of the importer can have no influence on this part of the subject. It is too obvious for controversy that they interfere equally with the power to regulate commerce." And inter-state and foreign commerce in this respect stand alike. The power to regulate both is given to Congress in the same language and the same clause of our National Constitution.

We admit the propositions contained in the brief of Mr. Ladd and opinion of Judge Blodgett. That property that may be the subject of commerce, or that has been the subject of commerce, either foreign or inter-state and has become mingled with the property of the state are proper subjects of state taxation.

The case supposed by Mr. Ladd of timber cut within the state, to be manufactured at mills within the state and then carried beyond the state for sale, is treading near the border line, but admitting that the intent there to make the timber the subject of commerce after it is manufactured is too remote to make the timber before the manufacture a subject of inter-state commerce, in fact, the situation would be entirely changed where the timber is started immediately to its destination in another state and it is taxed in the state where produced while in transit to the other state where it is to be manufactured and sold. And the last case is the one at bar. And the fact that our property at the time of taxation was in transit to the state of Maine, and that in fact it was then the subject of inter-state commerce, makes the destinction between the supposed case of Mr. Ladd and our case. As we understand the rule of law a naked intent would not have the effect to create a right or exemption as in case of a residence an intent to acquire a residence in a given jurisdiction, would give no rights of citizenship in that juirsdiction, but if a person has acquired the rights an intent to return and resume those rights, do sustain those rights during an absence of the person for a long or short period as the case may be.

Applying the same rule to the matter in hand we think that an intent on the part of the owner of any description of personal prop-